

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 155245

ELISAH KYLE THOMAS,

Defendant-Appellant.

Court of Appeals No. 326311

Lower Court No. 14-009512-01-FC

**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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Table of Contents

Index of Authorities	ii
Statement of Appellate Jurisdiction	1
Counter-Statement of Questions Presented	2
Counter-Statement of Facts	3
Argument	8
I. Only an identification procedure that is both unnecessary and suggestive violates due process. The police found defendant, who fit the description of the shooter, in the area of the shooting after the victim had been transported to the hospital, and within an hour of the shooting, showed the victim a photograph of defendant taken by an officer on her cell phone because no other photos of him were available. The circuit court clearly erred in suppressing the victim's identification of defendant when the photo showup was necessary to determine whether defendant was the perpetrator or the police needed to continue the investigation	8
Standard of Review	8
Discussion	8
II. The suppression of a pretrial identification does not bar a witness from identifying the defendant in court if the witness has an independent basis for that identification. The victim saw defendant earlier on the night of the shooting, stood face-to-face with him half an arm-length away during the shooting, and accurately described him to the police before being transported to the hospital and again at the hospital, less than one hour after the shooting. The circuit court clearly erred in suppressing the victim's in-court identification of defendant where the victim had an independent basis for that identification	15
Standard of Review	15
Discussion	15
Relief	18

INDEX OF AUTHORITIES

FEDERAL CASES

<i>Manson v Brathwaite</i> , 432 US 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977)	10
<i>Neil v Biggers</i> , 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972)	10
<i>Perry v New Hampshire</i> , __ US __; 132 S Ct 716; 181 L Ed 2d 694 (2012)	11
<i>Russell v United States</i> , 408 F2d 1280 (CA DC, 1969)	14
<i>Stovall v Denno</i> , 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967)	6, 9, 10, 13

STATE CASES

<i>Connecticut v Wooten</i> , 227 Conn 677; 631 A2d 271 (1993)	14
<i>People v Gray</i> , 457 Mich 107; 577 NW2d 92 (1998)	9, 15, 16
<i>People v Hornsby</i> , 251 Mich App 462; 650 NW2d 462 (2002)	9
<i>People v Johnson</i> , 59 Mich App 187; 229 NW2d 372 (1975)	11
<i>People v Kachar</i> , 400 Mich 78; 252 NW2d 807 (1977)	16
<i>People v Libbett</i> , 251 Mich App 353; 650 NW2d 407 (2002)	11, 12, 14
<i>People v McDade</i> , 301 Mich App 343; 836 NW2d 266 (2013)	8, 15

<i>People v Elisah Kyle Thomas</i> , unpublished per curiam opinion of the Court of Appeals, issued December 8, 2016 (Docket NO. 326311)	7
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STATUTES

MCL 750.83	5
MCL 750.84	5
MCL 750.226	5
MCL 750.227	5
MCL 750.227b	5
MCL 750.529	5

STATEMENT OF APPELLATE JURISDICTION

The People agree that the Court has jurisdiction over this case.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Only an identification procedure that is both unnecessary and suggestive violates due process. The police found defendant, who fit the description of the shooter, in the area of the shooting after the victim had been transported to the hospital, and within an hour of the shooting, showed the victim a photograph of defendant taken by an officer on her cell phone because no other photos of him were available. Did the circuit court clearly err in suppressing the victim's identification of defendant when the photo showup was necessary to determine whether defendant was the perpetrator or the police needed to continue the investigation?

The People answer: Yes

Defendant answers: No

The Court of Appeals answered: Yes

The Circuit Court would answer: No.

II.

The suppression of a pretrial identification does not bar a witness from identifying the defendant in court if the witness has an independent basis for that identification. The victim saw defendant earlier on the night of the shooting, stood face-to-face with him half an arm-length away during the shooting, and accurately described him to the police before being transported to the hospital and again at the hospital, less than one hour after the shooting. Did the circuit court clearly err in suppressing the victim's in-court identification of defendant where the victim had an independent basis for that identification?

The People answer: Yes

Defendant answers: No.

The Court of Appeals did not address the issue.

The Circuit Court answered: No.

COUNTER-STATEMENT OF FACTS

On October 17, 2014, at approximately 8:30 or 9:00 p.m., Dwight Dykes was shot by a man he later identified as defendant Elisah Kyle Thomas. Defendant attempted to rob the victim, and shot the victim when he did not give him anything. 1/30, 4-5, 13.¹ The victim viewed defendant for six or seven seconds at a distance of about half an arm-length away. Although it was dark, he could see defendant's face from his forehead to his chin, and had no problem seeing defendant's eyes, nose and mouth. 1/30, 4-6, 15. The victim saw the gun, but his focus was on defendant's face. 1/30, 17.

This was not the first time the victim had seen defendant that night. About ten minutes earlier, the victim had walked past defendant on his way to pay a coworker. On that occasion he saw defendant for approximately three seconds. It was dark out, but he could see defendant's face from his eyebrows to his chin. Defendant was wearing the same clothing as he wore at the time of the shooting. 1/30, 6-8, 12-13, 19-20.

The victim went to a church after being shot and soon thereafter was taken to the hospital. 1/30, 8, 21. In the ambulance, he provided the police with a description of his assailant. He said he described the shooter as approximately his height and weight (5'9", 145 lbs), with dark skin, and a black hood. 1/30, 22-23. At an evidentiary hearing, the victim testified that defendant had facial hair. He had previously testified that defendant did not really have facial hair, and explained at the hearing that defendant had peach fuzz. 1/30, 14-15, 19.

¹ Transcripts are cited in this brief by month and day of proceedings followed by page numbers.

Officer Samellia Howell arrived on the scene as the victim was being loaded into the ambulance in front of a church approximately half a block from the location of the shooting. After receiving information regarding the description of the shooter, she canvassed the area. She then saw defendant, who matched the description. She stopped him and patted him down. He provided his name and she ran it through the LEIN. On learning that defendant had no warrants or convictions, she recorded his information and then took his photograph in front of a Mobil station. 1/30, 24-29, 47-48. She estimated that she took the photograph five or ten minutes after the shooting. 1/30, 38. Officer Howell did not have probable cause to arrest defendant and did not believe she could bring him to the hospital without probable cause.² 1/30, 35-37.

Officer Howell estimated that it took her five minutes to get to the hospital and that it was another two or three minutes before she saw the victim. The victim provided a description of the shooter that matched defendant, including stating that he had seen him before in the neighborhood and describing him as between fifteen and twenty years old, standing 5'9" tall³ and weighing 200 pounds. 1/30, 30-32, 39-40, 45-46. Officer Howell told the victim she was going to show him a picture, and then showed him defendant's photo on her phone and stated "was this the guy who shot you?" Within seconds, the victim began crying and stated "that's him." 1/30,

² Investigator Glenda Fisher explained that mug shots are not accessible from LEIN, and an officer cannot obtain them while in a scout car. Officers can use driver-license photos in a photo array, but she prefers not to because they have a different background, which causes the photos to stand out. Moreover, with mug shots, the police have a computer system that retrieves similar photos for the array, whereas there is no such system for driver-license photos. 1/30, 53-58, 63. Investigator Fisher also explained that the police cannot force a suspect who has not been arrested to participate in a lineup. She added that while the police could arrange to drive a victim by a suspect, it is not frequently done. 1/30, 58-5.

³ Defendant is 5'8" or 5'9" tall. 1/30, 65.

31-34, 40-41. According to Officer Howell, the time from her arrival at the crime scene until the identification was between fifteen and twenty minutes. 1/30, 35.

The victim similarly testified that he spoke to an officer within five or ten minutes of his arrival at the hospital. He had yet to see a doctor. 1/30, 8-9. The officer showed him a photo on the officer's cell phone⁴ and asked if it was the person who had shot him. He was not told he had to pick the person or that it may not be the person. He recognized the face as the person who shot him. 1/30, 10-12, 17.

The People charged defendant with armed robbery,⁵ assault with intent to murder,⁶ assault with intent to do great bodily harm less than murder,⁷ carrying a concealed weapon,⁸ carrying a weapon with unlawful intent⁹ and felony-firearm.¹⁰ On October 31, 2014, the district court bound defendant over to circuit court as charged. 10/31, 18.

Defendant moved to suppress the identification, arguing that "the photo show-up procedure was unnecessarily suggestive and conducive to irreparable mistaken identification."¹¹ The People opposed the motion, arguing that the identification procedure was the functional

⁴ A printed copy of the photo was admitted as Exhibit 1.

⁵ MCL 750.529.

⁶ MCL 750.83.

⁷ MCL 750.84.

⁸ MCL 750.227.

⁹ MCL 750.226.

¹⁰ MCL 750.227b.

¹¹ Motion to Suppress Identification, ¶ 2.

equivalent of a permissible on-scene showup procedure. The hospitalized victim could not have been brought to the scene to identify defendant, and practicality and common sense dictated taking a photograph of defendant rather than detaining him and bringing him to the hospital for a showup.¹² In reply, defendant argued the use of the cell phone photo was impermissible and that an evidentiary hearing was necessary to determine the identification procedures used.¹³

The circuit court granted the request for an evidentiary hearing at the conclusion of a hearing held on January 16, 2015. 1/16, 11-12.

The victim, Officer Howell, and Investigator Fisher testified at a hearing held on January 30, 2015. After hearing the parties' arguments, the court promised a decision within one week. 1/16, 91.

The court granted defendant's motion in an opinion and order entered on February 6, 2015. After reciting the facts and summarizing the standard for reviewing identification procedures, the court acknowledged the People's argument that the procedure used was the equivalent of a one-person showup permitted in *Stovall v Denno*.¹⁴ The court rejected that argument, explaining:

In the case at hand, however, the People do not cite to any case law that explicitly equates a photographic identification with a "showup", and this court declines to do so in the absence of precedent. Additionally, this case does not present the mortal exigency critical to the analysis in *Stovall*. Further, after extensive review of the law on identification procedures, this court is unable to find any support for the proposition that temporal proximity between the crime

¹² People's Brief in Support of Response to defendant's Request for *Wade* Hearing, p 3.

¹³ Defendant's Reply to People's Response to Defendant's Request for *Wade* Hearing, pp 2-3.

¹⁴ *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

and the exhibition of a single photograph, by itself, overcomes the constitutional infirmity of impermissible suggestiveness.

The court then distinguished other cases relied on by the People, and held that “based on the totality of the circumstances in this case and the well developed skepticism surrounding single photograph identification in the applicable case law, the showing of a single photograph of the defendant to Mr. Dykes was so impermissibly suggestive that it violated Mr. Thomas’ right to due process.”

Turning to the question whether the victim had an independent basis to identify defendant in court, the court concluded that the People had not shown an independent basis by clear and convincing evidence. The court reasoned that “[t]he assault happened quickly, in the dark, by an unknown person whose description by Mr. Dykes shifted subtly between the preliminary examination and the evidentiary hearing. Further, the description provided to Officer Howell could have described many young men in the area where Mr. Thomas was spotted and photographed.”

On February 10, 2015, the court dismissed the case on defendant’s motion. 2/10, 4.

On December 8, 2016, the Court of Appeals reversed the decision of the trial court.¹⁵ The Court determined that, considering all the surrounding circumstances, the identification procedure was not impermissibly suggestive. The Court also reasoned that the showing of the single photo was comparable to a permissible on-the-scene identification. Judge Shapiro concluded otherwise and dissented.

¹⁵ *People v Elisah Kyle Thomas*, unpublished opinion of the Court of Appeals, issued December 8, 2016 (Docket No. 326311).

ARGUMENT

I

Only an identification procedure that is both unnecessary and suggestive violates due process. The police found defendant, who fit the description of the shooter, in the area of the shooting after the victim had been transported to the hospital, and within an hour of the shooting, showed the victim a photograph of defendant taken by an officer on her cell phone because no other photos of him were available. The circuit court clearly erred in suppressing the victim's identification of defendant when the photo showup was necessary to determine whether defendant was the perpetrator or the police needed to continue the investigation.

Standard of Review

The Court reviews a trial court's decision to suppress identification evidence for clear error, but reviews underlying questions of law de novo.¹⁶ A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made.¹⁷

Discussion

This case presents the question whether the police may show a victim a photograph of a suspect in lieu of transporting the suspect to the location of the victim for a prompt identification of him in the aftermath of the crime. The trial court held that the police could not, essentially holding that the use of a single photograph in an identification procedure always violates due process. But in so holding, the court failed to recognize that suggestiveness of the procedure alone does not violate a defendant's constitutional rights. The procedure must be *unnecessarily*

¹⁶ *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

¹⁷ *Id.*

suggestive, and suggestive procedures are sometimes necessary to further an investigation and protect both the public and a suspect's rights.

Michigan courts have often stated that an identification procedure violates due process when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.¹⁸ In applying that test to corporeal lineups, photo arrays, and single photo showups conducted well after the crime at a time when an array could have been used, courts understandably focus on the suggestiveness of the procedure rather than determine whether that suggestiveness was impermissible or unnecessary. The United States Supreme Court and Michigan courts, have, however, held that unquestionably suggestive identification procedures may be necessary and when necessary, the use of those procedures do not violate due process.

In *Stovall v Denno*,¹⁹ the United States Supreme Court held that a one person showup identification procedure did not violate due process. In that case, one victim was stabbed to death during a home invasion and the other was stabbed eleven times. The police arrested the defendant the next day, and the following day brought him to the surviving victim's hospital room, where they asked her whether defendant "was the man" and the police had him say a few words for voice identification. Addressing the question whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny the defendant due process of law, the Court explained that whether the confrontation violated due process depends on the "circumstances surrounding it." An "immediate hospital confrontation

¹⁸ E.g. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Hornsby*, 251 Mich App 462, 465; 650 NW2d 462 (2002).

¹⁹ *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

was imperative” in *Stovall*. Adopting the reasoning of the lower court, the Supreme Court reasoned that only the victim could exonerate the defendant, no one knew how long she might live, and she could not visit the jail for a lineup. The Court concluded that the only feasible procedure was to take the defendant to the hospital.²⁰

Subsequently, in *Neil v Biggers*,²¹ the Supreme Court considered a one-person showup conducted seven months after a sexual assault. The police resorted to the showup because no suitable lineup could be conducted due to the absence of anyone fitting the defendant’s description at the jail or juvenile home. In synthesizing the Court’s prior decisions, the Court explained that “[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and *unnecessarily suggestive* ones are condemned for the further reason that the increased chance of misidentification is gratuitous.”²² Five years later, in *Manson v Brathwaite*,²³ the Court characterized *Biggers* as standing for the proposition that “[t]he admission of testimony concerning a *suggestive and unnecessary* identification procedure does not violate due process as long as the identification possesses sufficient aspects of reliability.”

Those decisions make clear that to violate due process, an identification procedure must not only be suggestive but also be unnecessary. The Supreme Court reiterated that point four

²⁰ *Id.* at 302.

²¹ *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).

²² *Id.* at 198 (emphasis added).

²³ *Manson v Brathwaite*, 432 US 98, 106; 97 S Ct 2243; 53 L Ed 2d 140 (1977) (emphasis added).

years ago in *Perry v New Hampshire*.²⁴ The Court stressed that *Biggers* and *Manson* set forth “the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement.” First, the Court explained, “due process concerns arise only when law enforcement officers use an identification procedure that is *both suggestive and unnecessary*.” And, even when such a procedure is used, suppression is not the inevitable consequence.²⁵

Michigan has long followed that Supreme Court precedent in considering on-the-scene showups, concluding that the suggestive procedure is a necessary one that does not violate due process. Forty years ago, in *People v Johnson*,²⁶ the Court of Appeals considered a case in which the police apprehended a suspect one-half hour after a theft at a store and promptly returned him to the store where a salesperson identified him. The Court deemed the on-the-scene procedure a reasonable police practice and rejected the argument that it was so suggestive as to deny the defendant due process. The Court explained that the practice allows for the confirmation or denial of identification while the witness’ memory is still fresh and also allows for the expedited release of an innocent suspect. Possible suggestiveness, the Court reasoned, could be argued by the defendant at trial.

More recently, in *People v Libbett*,²⁷ the Court of Appeals considered a case in which the victim was carjacked by two men whom he described as a tall black man and a short black man.

²⁴ *Perry v New Hampshire*, __ US __; 132 S Ct 716, 724; 181 L Ed 2d 694 (2012).

²⁵ *Id.* (emphasis added).

²⁶ *People v Johnson*, 59 Mich App 187, 189-190; 229 NW2d 372 (1975).

²⁷ *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002).

The police located the car approximately one hour later and detained four men after a chase. Approximately two hours after the carjacking, the police transported the victim to the two locations where the suspects were being detained. At one location, he identified the defendant as the taller man, at the other, he identified the defendant's cousin as the shorter man. In rejecting the defendant's challenge to the identification procedure, the Court reiterated that on-the-scene confrontations are a reasonable and indispensable police practice because "they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely the unfortunate victim of circumstances."²⁸ They also "promote fairness by assuring greater reliability."²⁹

The *Libbett* court reasoned that when "presented with four black males with no greater description than one was taller than the other, it was reasonable for the police to have [the victim] identify whether any of the four individuals were actually the perpetrators." The Court rejected the defendant's attempt to limit on-the-scene identifications to those that take place within minutes of the crime. The Court explained that the police were confronted with the possibility that two of the men were not involved in the crime. It emphasized that because the victim had seen the perpetrators just two hours earlier, "their appearance was still fresh in his mind."³⁰

The identification procedure in this case, like those in *Johnson* and *Libbett*, was necessary and not impermissibly suggestive. As in *Libbett*, the police had a general description of the perpetrator and a suspect who met that description. The police found defendant near the crime

²⁸ *Id.* at 361.

²⁹ *Id.*

³⁰ *Id.* at 362.

scene not long after the shooting, and unquestionably could have brought defendant to the scene of the crime for possible identification by the victim or brought the victim to defendant, had the victim been available for that showup procedure. The victim, however, had been transported to the hospital. Under those circumstances, the police could have brought defendant to the hospital.³¹ That the police chose a less intrusive procedure in this case does not convert an otherwise permissible police practice into a violation of due process. The photo used, which depicts defendant standing on the street, was the photographic equivalent of an in-person identification at the crime scene.

The hospital photo showup procedure clearly was necessary in this case. The police had no other less-suggestive identification procedures to employ. Since defendant did not have a criminal record, the police could not create a photo array using mug shots. And a photo array using mug shots and a driver's license photo (assuming defendant had one) would have caused defendant's photo to stand out. The police also did not have the capability of creating a photo array with driver's license photos. The only alternative would have been an equally suggestive one. The police would have had to wait for the victim's release from the hospital, ascertain defendant's whereabouts at a particular time, and transport the victim to view defendant. In the meantime, the police would have wasted important time in the investigation and increased the danger to the public and allowed the victim's memory to fade.

The police needed to determine whether defendant was subject to arrest for the assault and robbery of the victim or merely the unfortunate victim of circumstance, in which case the police would have continued the investigation without undue delay. Conducting the showup

³¹ See *Stovall*, 388 US at 302.

while the victim's memory was still fresh, less than one hour after the assault, increased the reliability of the resulting identification.³² The police did not say anything to suggest that the victim should identify defendant. The officer simply asked defendant whether the photo was the guy who shot him. The victim began to cry and identified defendant as his assailant. That prompt, reliable identification was necessary to further the investigation and, considering all the circumstances, was not impermissibly suggestive. The Court of Appeals therefore correctly concluded that the circuit court erred in suppressing the victim's identifications of defendant.

³² *Libbett*, 251 Mich App at 361; *Russell v United States*, 408 F2d 1280, 1284 (CA DC, 1969); *Connecticut v Wooten*, 227 Conn 677, 686-687; 631 A2d 271 (1993).

II

The suppression of a pretrial identification does not bar a witness from identifying the defendant in court if the witness has an independent basis for that identification. The victim saw defendant earlier on the night of the shooting, stood face-to-face with him half an arm-length away during the shooting, and accurately described him to the police before being transported to the hospital and again at the hospital, less than one hour after the shooting. The circuit court clearly erred in suppressing the victim's in-court identification of defendant where the victim had an independent basis for that identification.

Standard of Review

An appellate court reviews a trial court's decision to suppress identification evidence for clear error.³³ A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made.³⁴

Discussion

The circuit court clearly erred in determining that the victim did not have an independent basis of his in-court identification of defendant. A court must consider the totality of the circumstances in making that determination.³⁵ Among the factors involved in the inquiry are: (1) the witness' prior relationship with, or knowledge of, the defendant; (2) the witness' opportunity to observe the offense; (3) the length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the witness' description of the person and the defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any

³³ *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

³⁴ *Id.*

³⁵ *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

prior identification of another person; (7) the nature of the offense and the physical and psychological state of the victim; and (8) any idiosyncratic or special features of the defendant.³⁶ Not all the factors will always be relevant, and a court may give different weight to particular factors depending on the circumstances of the case.³⁷

In this case, the victim unquestionably could see defendant's face during the assault—he stood face-to-face with defendant at a distance of half an arm's length away. Yet the circuit court surprisingly discounted that vantage point and instead focused on lighting conditions. In doing so, the court failed to recognize that little light is necessary to recognize a person who is standing one foot away. The court likewise erred in placing heavy emphasis on the amount of time defendant stood in front of the victim and the victim's admission that his adrenalin was up. One need not stare at a person's face for minutes to recognize that person again. The victim's focus was on defendant's face during the assault, and he had seen defendant a few minutes earlier on the street. A person's face stands out more on second viewing, and in this case, the court erred in failing to give any weight to that prior encounter.

The court then compounded its error by focusing on whether the victim's description of his assailant could have described other men instead of on whether it described defendant. It comes as no surprise that the victim's description of defendant was a general one—he provided that description while suffering from a gunshot wound and waiting for transportation to the hospital and again while awaiting treatment at the hospital. He was not sitting down with a sketch artist who would have asked probing questions about defendant's facial features. While

³⁶ *Id.* at 116.

³⁷ *Id.* at 117, n 12; see also *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

the description may have described other men, it accurately described defendant and the clothing he was wearing. To that extent, it favored a finding of an independent basis, not against the finding, as the circuit court believed.

In summary, the totality of the circumstances demonstrate that the victim had an independent basis for his in-court identification of defendant. He saw defendant twice that night, and stood face-to-face with him during the assault. He accurately described defendant in the minutes after the shooting, and the disputed identification occurred within one hour of the crime, not days, weeks or months later when memories might have faded. In testifying at trial, the victim would not be identifying defendant because he saw his photo in the hospital. He would be identifying him because he recognized him as the man who shot him. The circuit court therefore clearly erred in suppressing the in-court identification.

RELIEF

WHEREFORE, the People request that this Court deny defendant's application for leave to appeal.

Respectfully Submitted,

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